(13)

No. 87-1555

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JAMES H. BURNLEY IV, SECRETARY,
DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE FOR NATIONAL RAILROAD PASSENGER CORPORATION AND ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an agency charged with maintaining railroad safety and investigating railroad accidents can, consistently with the Fourth Amendment, establish by regulation a program under which operating railroad employees are subject to warrantless alcohol and drug tests following their involvement in specified accidents or "human factor" rule violations?

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This brief is filed on behalf of the National Railroad Passenger Corporation and the Association of American Railroads, as amici curiae, in support of the Petitioner.[1]

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[1] Consents from counsel for the parties have been filed with the Clerk of this Court.

INTERESTS OF THE AMICI

The National Railroad Passenger Corporation ("Amtrak") manages the country's intercity rail passenger system. Amtrak operates trains in 43 states over a 24,000 mile network of track (most of which is owned and also used by freight railroads) with a workforce of some 22,000 employees. The Association of American Railroads ("AAR") is a trade association representing the nation's freight railroads, and has long studied and represented the industry on such matters as railroad operations, maintenance, and safety.

The Ninth Circuit's decision below—invalidating Federal Railroad Administration regulations which established a carefully focused program of alcohol and drug testing of railroad employees involved in certain accidents and human factor rule violations—is of grave concern to Amtrak and AAR. For more than two years, the present litigation has chilled implementation of the regulations, and by extension, slowed efforts by some railroads to promote additional measures to further curtail alcohol and drug use within the industry. Yet alcohol and drug-related accidents continue to occur, some involving passenger fatalities, many involving employee fatalities, and some imperiling entire communities by release of hazardous cargos.

As responsible employers, passenger carriers, and industry spokesmen, amici support all reasonable plans to prevent these tragedies. In adopting its regulations after a rulemaking proceeding of more than two years' duration, which was itself preceded by several years of analysis and discussion, the FRA determined that industry-wide toxicological testing is an essential step in dealing with the current substance abuse problem.

The FRA regulations provide a significant tool for identifying employees who use alcohol or drugs while performing functions associated with train operations.

By holding the regulations invalid in this case, the Ninth Circuit has seriously impaired efforts to prevent many avoidable fatalities, injuries, and much property damage in the railroad industry.[2] Amici thus have a direct and immediate interest in the outcome of this case.

STATEMENT

Acting pursuant to its statutory role of overseeing railroad safety, the Federal Railroad Administration ("FRA"), after thorough investigation, determined that alcohol and drug use by railroad personnel is a proven cause of a significant number of recent, avoidable railroad accidents and fatalities. To address this problem the FRA ultimately concluded that an alcohol and drug testing program *covering a limited number of railroad employees actually responsible for the movement of rail traffic* would be the most effective first step. Such a program would achieve the agency's desired objectives of insuring public safety by (1) increasing industry awareness of the correlation between accidents and alcohol or drug use, (2) deterring on-the-job substance abuse, (3) detecting and removing from service individuals whose use of alcohol or drugs presents an immediate safety risk, and (4) obtaining needed information on

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[2] Railroad companies operating in the Ninth Circuit find themselves particularly disabled from addressing substance abuse by employees. Not only has the Court of Appeals there invalidated the FRA's regulations in the opinion presently at issue, it has also, in an opinion totally at odds with a prior Eighth Circuit decision, held that its Fourth Amendment analysis is determinative of the *contractual expectations* of parties to *pre-existing* collective bargaining agreements, thus effectively prohibiting railroads from instituting substance abuse programs independently. *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad*, 838 F.2d 1087 (9th Cir. 1988), *petition for cert. filed*, No. 87-1631 (April 1, 1988). That case involves the same critical public safety concerns raised here, but presents distinct legal issues regarding implementation of drug use testing by a private employer in the context of a collective bargaining relationship.

which to base further regulatory efforts.[3] The regulations, applying almost exclusively to those railroad employees whom Congress determined in the Hours of Service Act to be performing service connected with the movement of trains, *see* 45 U.S.C. § 61(b)(2), 49 C.F.R. § 219.3(d), (e), were promulgated on August 2, 1985.

Part C of the regulations mandates prompt testing (by medical analysis of blood and urine samples) of Hours of Service employees involved in any of the following: (i) any train accident resulting in either a fatality, a release of a hazardous material (if accompanied by an evacuation or a reportable injury), or damage to railroad property of $500,000 or more; (ii) a collision resulting in a reportable injury or damage to railroad property of $50,000 or more; or (iii) a "train incident that involves a fatality to any on-duty railroad employee." 49 C.F.R. § 219.201(a).

Part D of the regulations permits, but does not require, prompt testing (by analysis of urine and breath samples) of Hours of Service employees who are (i) directly involved in reportable accidents or incidents and are reasonably suspected by supervisors to have contributed to the cause or severity of those accidents or incidents; or (ii) directly involved in specific human error[4] operating rule violations. 49 C.F.R. § 219.301.[5]

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[3] *See, e.g.*, 50 Fed. Reg. 31,508, 31,540 (August 2, 1985).

[4] The FRA notice announcing promulgation of the regulations describes in layman's terms the operating violations that are covered, and explains that each of these particular violations is "an objective event and a clear indication of a material deviation from safe practice suggesting the real possibility that the employee is not fit." 50 Fed. Reg. at 31,553.

[5] Part D also permits testing of employees whom supervisors reasonably believe, on the basis of personal observation, to be under the influence of alcohol or drugs. 49 C.F.R. § 219.301(b)(1), (c)(2). The court below upheld these provisions, and they are not further discussed here.

Noting that it had "no jurisdiction to terminate employment relationships," 50 Fed. Reg. at 31,546, the FRA generally left the disciplinary consequences of positive test results to be determined by the employing railroad. It imposed as the only federal sanction a requirement that employees refusing to provide blood and urine samples under the mandatory (Part C) testing program be disqualified for nine months from Hours of Service work. 49 C.F.R. § 219.213. The agency expressly forbade physical coercion or "any other deprivation of liberty." 49 C.F.R. § 218.11(e). Hours of Service employees employed on and after February 10, 1986 were "deemed to have consented to" the testing program. 49 C.F.R. § 219.11(a).

The Railway Labor Executives' Association and certain labor organizations brought this action to enjoin the FRA's testing program, relying, in relevant part, on the Fourth Amendment.

The Proceedings Below

The District Court for the Northern District of California upheld the constitutionality of the challenged regulations, stating that "there are no factual issues." The court noted that the regulations serve compelling governmental purposes:

> . . . the government certainly has a valid public and governmental interest in the promotion of safety and railway safety, safety for employees, and safety for the general public that is involved with the transportation. It's also obvious from the length of time and the detail in which the regulations have gone that the government has made a sincere attempt to gath[er] together information and do some balancing of interests on its own.

Appendix B to Petition, at 52a.

A divided panel of the Court of Appeals for the Ninth Circuit reversed. The Secretary of Transportation sought review here, and certiorari was granted on June 6, 1988.

SUMMARY OF ARGUMENT

1. The FRA's regulatory alcohol and drug testing program is reasonable under any construction of the Fourth Amendment. The public interest in implementation of the regulations is compelling, in light of the risk to safety posed by train operators who abuse alcohol or drugs, the history of accidents related to substance abuse in the industry, and the need to prevent such tragedies in the future. Employee privacy interests are not unconstitutionally impaired, in view of the compelling governmental purpose underlying the regulations, extensive notice to affected employees, the lack of any intrusion upon "private" information other than illegal or wrongful drug or alcohol use, the loss of privacy which any employment relationship entails, and the lack of any physical compulsion. This Court's opinions regarding administrative searches, searches in the exigent circumstances posed by a safety investigation, and intrusions based upon non-individualized determinations of reasonable suspicion, fully support the conclusion that the FRA's regulations are consistent with the Fourth Amendment.

2. The Fourth Amendment proscribes arbitrary searches or seizures. Since the FRA regulations forbid forced administration of tests, no search or seizure is involved, despite the adverse employment-related consequences which may flow from a refusal to undergo testing. *Wyman v. James*, 400 U.S. 309 (1971).

ARGUMENT

I. THE FRA'S REGULATIONS SATISFY THE FOURTH AMENDMENT'S "REASONABLENESS" REQUIREMENT.

It is sometimes too widely assumed that the Fourth Amendment bars *all* searches and seizures. But, of course, its bar, by its terms, extends only to "unreasonable searches and seizures." Under the facts of this case, the provisions of the FRA regulations are not "unreasonable."

A. The FRA's Regulations Rest Upon Compelling Interests of Public Safety Which Are Not Overcome By Countervailing Private Concerns.

Any determination of Fourth Amendment reasonableness requires a balancing of the " 'need to search against the invasion which the search entails.' " *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985). This case is viewed fairly only in the context of the great disparity that exists between the compelling public interests which the FRA's regulations serve, and the limited private intrusions which they cause.[6]

Quite simply, the FRA regulations serve to remove active substance abusers from responsibilities for operating trains, to deter other operators from engaging in drug or alcohol abuse, and to protect public safety by

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[6] For relevant discussions of the legal implications of drug testing at the workplace, *see* Comment, *"Drug Testing of Government Employees Should Not Be a Matter of Fourth Amendment Concern" Cries a Lone Voice in a Wilderness of Opposition*, 1987 B.Y.U. L. Rev. 1239; Note, *Employee Drug Testing Legislation: Redrawing the Battlelines in the War on Drugs*, 39 Stan. L. Rev. 1453 (1987); Comment, *Random Drug Testing of Government Employees: A Constitutional Procedure*, 54 U. Chi. L. Rev. 1335 (1987); Comment, *Behind the Hysteria of Compulsory Drug Screening in Employment: Urinalysis Can Be a Legitimate Tool For Helping Resolve the Nation's Drug Problem if Competing Interests of the Employer and Employee are Equitably Balanced*, 25 Duq. L. Rev. 597 (1987).

facilitating investigations of railroad accidents. As is true of a handful of other industries (e.g., nuclear power, air traffic control, trucking, aviation), the threat to public safety posed by Hours of Service employees whose judgment or senses are clouded by alcohol or drugs is plain. Substance abusers who operate trains endanger themselves; they also endanger the lives and property of fellow employees, rail passengers, railroad companies, and indeed—as a result of toxic cargos—entire communities.[7] Other means of protecting the public are unworkable: railroad employees often must operate in far-flung locations and around the clock with little direct supervision, and, in any event, drug or alcohol ingestion sufficient to affect operational performance adversely frequently cannot be detected by even skilled observers.[8] Toxicological testing, in contrast, does work.[9]

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[7] Derailments of trains in at least five states during 1987 caused evacuation of over 22,200 persons from their homes. *See* Associated Press, December 13, 1987, July 22, 1987, May 6, 1987; United Press International, February 2, 1987, January 6, 1987. A single derailment in Crofton, Kentucky recently required evacuation of 15,000 residents. *See* Associated Press, June 24, 1988.

[8] *See* 50 Fed. Reg. 31,508, 31,526, 31,527, 31,536 (August 2, 1985).

[9] In 1981 Georgia Power Company employees suffered 5.4 injuries per 200,000 man-hours at its Vogtle nuclear power plant construction site. In 1985 that number was fewer than .5 injuries per 200,000 man-hours.

In 1985 the Southern Pacific Railway reported a 71 percent drop in on-the-job accidents and injuries due to human-related error as compared to the previous year.

In 1982 the U.S. Navy identified 48 percent of the young enlisted men working for it as having used drugs for non-medical purposes. By last year that figure had dropped to 4 percent.

The common element here is the employer's use of drug testing as part of a comprehensive health and safety program aimed at identifying and treating drug abusers.

Angarola, *Protect Safety, Not Drug Abuse,* American Bar Association Journal 35 (August, 1986).

Following the Department of Defense's institution in 1982 of mandatory testing for every branch of the service, there was a 75

The public interest in toxicological testing of railroad employees entrusted with safety-sensitive responsibilities is heightened by the fact that, as the mounting number of drug and alcohol-related accidents confirms, a serious substance abuse problem exists within the industry. The most tragic accident in recent memory, which resulted in 16 deaths and scores of injuries, occurred near Chase, Maryland on January 4, 1987. The two crewmen responsible for that accident tested positive for marijuana, and one had traces of the hallucinogenic drug PCP in his urine. Unfortunately, the Chase, Maryland accident was no anomaly: since 1980, sixty-five percent of railroad accidents involving loss of life have been alcohol or drug related.[10] In the last nineteen months alone there have been at least 51 major train accidents, involving 31 deaths, 375 injuries, and tens of millions of dollars in property damages, in which one or more railroad employees tested positive for drugs.[11] Over five percent of railroad employees undergoing post-accident testing test positive.[12]

Thus, the case for toxicological testing of railroad employees entrusted with operation of trains is a compelling one.[13] Opposing it are the asserted privacy inter-

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percent decrease in the number of personnel testing positive for marijuana, the most popular drug used. Use of other drugs declined as well. O'Connor, *The Military Says "No,"* Newsweek 26 (Nov. 20, 1986).

[10] United Press International, July 6, 1988 (quoting Atlanta Journal interview with John H. Riley, FRA Administrator).

[11] *See* Los Angeles Times, June 24, 1988 (interview with John H. Riley, FRA Administrator); *Developments in Drug and Alcohol Testing, 1988: Stenographic Transcript of Hearings on S. 1041 Before the Committee on Commerce, Science, and Transportation,* 100th Cong., 2d Sess. 50-1 (Statement of John H. Riley, FRA Administrator).

[12] *Developments in Drug and Alcohol Testing, 1988, supra* n.11, at 50-1 (Statement of John H. Riley, FRA Administrator).

[13] *Compare, e.g., Donovan v. Dewey,* 452 U.S. 594, 602 (1981) (substantial federal interest in improving the health and safety

ests of Hours of Service employees subject to testing. But Fourth Amendment rights "are implicated only if the [challenged conduct] infringe[s] 'an expectation of privacy that society is prepared to consider reasonable.'" *O'Connor v. Ortega*, 107 S.Ct. 1492, 1497 (1987) (plurality opinion). When the expectations of privacy asserted here are considered in the context of the public interest in saving lives, property, and communities, it is evident that those expectations must be quite limited.

For one thing, beginning well before the effective date of the regulations at issue, affected employees have had presumed and actual notice that they would be subject to testing. Union representatives participated extensively in the FRA's notice and comment proceeding, meetings have been held to explain the regulations to affected employees, and Part C testing has been heavily featured in news stories in connection with rail disasters. Employers administering Part D testing are required to give employees detailed notice of the provisions of that Part. *See* 49 C.F.R. § 219.309(b). Furthermore, the regulations as promulgated gave affected employees advance notice that the testing program would be implemented, and that their consent would be a condition of employment. 49 C.F.R. §§ 219.11(a), 219.201(a). At this late date Hours of Service employees can hardly claim surprise when, following their involvement in significant train accidents or rule violations strongly suggestive of operator error, they are approached to undergo toxicological testing. *Cf.*

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conditions in underground and surface mines supports warrantless administrative searches of mines); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (where a "reasonable suspicion" standard for border checkpoint stops would "largely eliminate any deterrent to the conduct of well-disguised smuggling operations," the public interest in conduct of such "seizures" is substantial for Fourth Amendment purposes); *Delaware v. Prouse*, 440 U.S. 648, 658 (1979) ("We agree that the States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles").

United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976) (controlling factor in upholding the constitutionality of warrantless, routine checkpoint stops in border areas is the limited nature of the subjective intrusion occasioned).

Second, the testing does not yield "private" information. The regulations do not authorize that samples be tested for any characteristic other than alcohol and drug abuse, nor do they authorize release to railroads by the independent medical facilities conducting the tests of medical information (other than the presence of alcohol or drugs or their metabolites) derived from the tests. The only personal information divulged to railroads is alcohol and drug use—information in which employees operating trains have no reasonable expectation of privacy. *United States v. Jacobsen*, 466 U.S. 109, 122-4 (1984).[14]

Third, the tests here are administered in the context of the employment relationship, not in furtherance of a criminal investigation. FRA does not require that results be shared with law enforcement authorities; indeed, FRA states that "it is the policy of FRA to request the Attorney General to oppose production of the sample to a party in litigation" except under a subpoena or order. 49 C.F.R. § 219.301. Privacy expectations of employees must be "assessed in the context of the employment relation"; and where those expectations are impacted by actual "practices and procedures, or by legitimate regulation," and are intruded upon for work-related, as opposed to criminal investigatory, purposes, they lose some or all of their constitutional significance. *O'Connor*

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[14] In this connection, note that most, if not all, railroads have for years enforced "Rule G," an industry safety rule which prohibits railroad employees from using alcohol or drugs while on duty, from possessing these substances while on company property, and from reporting for duty while under the influence of alcohol or drugs.

v. Ortega, 107 S.Ct. at 1501 (plurality opinion).[15] *Cf. New Jersey v. T.L.O.*, 469 U.S. 325, 348-50 (1985) (Powell, J., concurring) (students have a lesser expectation of privacy than the population at large, given the degree of familiarity between and among students and teachers, teachers' necessarily "unparalleled" authority over them, and the degree of exposure of the public school setting to supervision or oversight by the community, parents, and fellow students).

For these reasons, and because the regulations do not permit forced administration of tests, *see infra*, pp. 19-20, the employee privacy interests involved here are, at most, a slight basis on which to ground a Fourth Amendment challenge to the crucial public safety regulations at issue. Even if those privacy interests are constitutionally cognizable, Respondents' Fourth Amendment challenge fails

[15] In *O'Connor*, the plurality reserved the issue of the "proper Fourth Amendment analysis for drug and alcohol testing of employees." The plurality's discussion of the "workplace context," moreover, concerned the expectations of privacy that pertain to "those areas and items that are related to work and within the employer's control." 107 S.Ct. at 1497. *But cf. New Jersey v. T.L.O.*, 469 U.S. 325, 337-43 (1985) (applying a similar relationship-based analysis to Fourth Amendment issues raised by a "search [by school authorities] of a child's *person* or of a closed purse or other bag carried on her person") (emphasis added).

O'Connor is useful on the present facts, however, in its implicit recognition that the employment relation necessarily entails some intrusions on privacy and personal autonomy that would not be expected or tolerated by private citizens in their personal lives. The degree to which expectations of privacy are reduced may very well depend to some extent on the nature of the job, and there may be some intrusions—e.g., use of physical force—which would violate legitimate expectations of privacy in most or all circumstances. This case, however, does not involve physical compulsion, *see infra*, pp. 19-20, nor does it involve requirements or standards of conduct that are extraordinary when considered in the light of employee responsibilities.

under the opinions of this Court giving content to the Amendment's "reasonableness" standard.

B. The FRA's Regulations Fall Within the "Administrative Search" Exception to the Fourth Amendment's Probable Cause and Warrant Requirements.

The FRA's regulations fit easily within the guidance of this Court's "administrative search" cases. Such cases hold that warrantless searches, unsupported by traditional probable cause determinations, of premises of heavily regulated businesses are reasonable when performed without force and pursuant to appropriate standards. *See New York v. Burger*, 107 S.Ct. 2636 (1987); *Donovan v. Dewey*, 452 U.S. 594 (1981); *United States v. Biswell*, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970). These cases, which emphasize the necessity for warrantless searches in order to meet the reasonable needs of public concern, turn on the fact that proprietors in such industries are aware of the extensive regulation to which they are subject and accordingly have no reasonable expectation of privacy.

Railroads were among the first modes of transportation to be extensively regulated. Although in recent years railroads have experienced some rate deregulation, government scrutiny remains close, particularly with respect to two areas that are vital in the present context: labor (*see, e.g.*, the Railway Labor Act, codified as amended at 45 U.S.C. §§ 151 *et seq.*) and safety (*see, e.g.*, the Federal Railroad Safety Act, codified as amended at 45 U.S.C. §§ 431 *et seq.*). Moreover, the Secretary of Transportation is now empowered to discipline railway workers for willful safety violations, and is charged with developing and implementing a licensing or certification program for locomotive engineers. *See* Rail Safety Improvement Act of 1988, P.L. 100-342, §§ 3-4, 13-17, 21-22 (June 22, 1988). Railroad employees are thus extensively regulated and subject to properly delineated administra-

tive searches, regardless of the presence or absence of warrants or probable cause.[16]

Administrative searches are valid, despite the absence of warrants or individualized suspicion, where (1) "there [is] a substantial government interest that informs the regulatory scheme pursuant to which the in-

[16] The Court of Appeals held that while railroads are heavily regulated, railroad employees are not. Passage on June 22, 1988 by Congress of the Rail Safety Improvement Act of 1988, which supplies the precise regulatory provisions identified by the Court of Appeals as lacking, has since nullified the distinction. *See Donovan v. Dewey*, 452 U.S. 594, 606 (1981):

> [I]t is the pervasiveness and regularity of the federal regulation that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment. . . . Of course, the duration of a particular regulatory scheme will often be an important factor in determining whether it is sufficiently pervasive to make the imposition of a warrant requirement unnecessary. But if the length of regulation were the only criterion, absurd results would occur. Under appellees' view, new or emerging industries, including ones such as the nuclear power industry that pose enormous potential safety and health problems, could never be subject to warrantless searches even under the most carefully structured inspection program simply because of the recent vintage of regulation.

Drug abuse is a relatively new phenomenon, as is toxicological testing and the increase in the frequency with which hazardous cargos are carried.

Even if the regulatory changes made by the Rail Safety Improvement Act are disregarded, the Court of Appeals' reasoning was unsound. The penalties and burdens of the administrative schemes in the heavily regulated business cases ultimately fell on individuals, not on companies. Moreover, railroad employees in fact have long been subject to extensive regulation. *See, e.g.*, 49 C.F.R. Parts 217 (requiring instruction of employees on operating rules and periodic testing of rule compliance); 218 (prescribing minimum safety requirements for railroad operating rules and practices—rules and practices which for the most part must be actually implemented entirely by employees); and 220 (establishing minimum requirements governing employees' use of radio communications in connection with railroad operations).

spection is made"; (2) warrantless inspections are necessary to the regulatory scheme; and (3) the inspection program, "in terms of the certainty and regularity of its application, [provides] a constitutionally adequate substitute for a warrant" (i.e., the regulations must advise that the search is being made pursuant to the law and in accordance with a properly defined scope, and must set appropriate limits on the time and place of the search). *New York v. Burger*, 107 S.Ct. at 2644.[17]

The governmental interest served by the FRA's regulations—public safety—could hardly be more compelling, as discussed above. In addition, testing must be done promptly after an accident or rule violation, if it is to serve its best purpose,[18] and given the time constraints, confusion following accidents, and lack of familiarity of railroad personnel with the court systems in the many locations where accidents or violations may occur, a warrant requirement is neither realistic nor feasible, nor really useful in protecting Fourth Amendment values.

Perhaps most important, the FRA regulations do provide a "constitutionally adequate substitute for a warrant." The circumstances in which testing is required or authorized are carefully defined in almost totally objective terms: no employee will be tested under the regulations who has not either (1) been directly involved in one of the specified train accidents or safety rule viola-

[17] The *Burger* opinion notes that "an expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's home." 107 S.Ct. at 2674. The testing authorized here is administered to individuals in their status as "employees," not in their status as private citizens.

[18] The FRA noted during the rulemaking proceeding the "difficulty associated with estimating previous alcohol and drug levels from specimens obtained some time later." 50 Fed. Reg. at 31,554. Part C tests are to be administered "as soon as possible after the accident or incident." 49 C.F.R. § 219.203(b)(1). Part D tests must be administered within 8 hours. 49 C.F.R. § 219.301(f).

tions; or (2) been directly involved in (*and* reasonably suspected by a supervisor to have contributed to the cause or severity of) a reportable accident or incident that results in injury, death, occupational illness, or damage to railroad property exceeding $5,200. The regulations explicitly require that property damage estimates be made in good faith. 49 C.F.R. § 219.201(c). In addition, all blood and urine samples are to be collected at independent medical facilities by medical personnel or technicians. 49 C.F.R. §§ 219.203(c), 210.305(a). Railroads failing to comply with any part of the regulations are subject to civil penalties. 49 C.F.R. § 219.9. The testing scheme is thus certain and regular in its application; railroad officials have limited discretion in executing it, as employees well know.[19]

The administrative search cases thus justify the FRA's regulations.

C. Cause Requirements Incorporated Into the Regulations Satisfy the Fourth Amendment in the Circumstances of This Case.

While conceding that the Constitution does not require warrants in the context of this case, the Court of Appeals

[19] The Court of Appeals concluded that the regulations are overbroad in scope because urine tests reveal drug usage, not impairment. In so holding, the court did not discuss the blood test alternative prescribed in the regulations. In any event, even assuming that testing cannot establish current impairment, the court did not address why persons who are sufficiently heedless of criminal laws and of their own wellbeing to take drugs should be presumed fit for duty. Surely it is reasonable for the FRA and railroads to conclude that such employees may have shown on occasion similar disregard for work-place rules and public safety. Nor did the court consider the fact that—as the empirical evidence regarding effects of drug testing programs shows, *supra*, n.9—involvement of a drug user in an accident or operator-error rule violation in itself is evidence bearing on the likelihood of impairment. Finally, the court did not explain why an employee's "right" to take illegal drugs in the privacy of his own home deserves precedence as a constitutional matter over the compelling interests of public safety which the FRA here seeks to advance.

concluded that the regulatory scheme was invalid because it did not premise test administration on "individualized suspicion." Whatever the merits of such analysis where a random or mass testing program is at issue, the court evidently failed to realize that the FRA regulations here contain implicit, *objective* cause requirements that satisfy Fourth Amendment concerns even apart from any applicability of the administrative search cases.

Specifically, the FRA deliberately crafted its regulations to require testing only following those accidents or rule violations which the FRA's experience in accident investigations showed to be either (1) difficult to investigate, (2) of significant public interest, or (3) historically attributable to operator error.[20] A legitimate intention to deter unsafe conduct and to perform safety investigations in the public interest thus is the sole motivating force underlying the regulatory classifications. In the context of the FRA's findings that an alcohol and drug problem exists in the railroad industry and that this problem has caused a significant number of serious accidents,[21] the fact that body fluids must be collected promptly if they are to be of value to investigators creates an exigency which fully justifies the intrusions these regulations entail. *Michigan v. Clifford*, 464 U.S. 287 (1984); *Michigan v. Tyler*, 436 U.S. 499 (1978). No "unreasonable" search or seizure is required.

In addition, the intrusions here result not from mere "inarticulate hunches," *see Terry v. Ohio*, 392 U.S. 1, 22 (1968), but instead from an "articulable basis amounting to a reasonable suspicion" that drug or alcohol abuse is involved. To repeat, drugs and alcohol have been shown to contribute to a significant number of serious rail accidents. Given this fact, involvement by operating personnel in such accidents (or in safety violations which

[20] *See, e.g.*, 50 Fed. Reg. at 31,542.

[21] *See, e.g.*, 49 Fed. Reg. 24,252, 24,254, 24,265 (June 12, 1984).

are likely to cause such accidents) in itself supports a reasonable suspicion of substance abuse. *Delaware v. Prouse*, 440 U.S. 648, 659 (1979). Adding to the weight of this suspicion, the FRA has excluded from its description of events triggering the testing requirements those accidents not normally attributable to operator error.[22] Thus, the FRA regulations express, in objective terms, sufficient grounds in the circumstances of this case for a constitutionally-adequate suspicion that the employees tested will be found to have improperly used alcohol or drugs.

At bottom, the Court of Appeals' rejection of these regulations is grounded not on a finding that they operate arbitrarily, but instead on the fact that they are objective, rather than subjective. This reasoning is ironic, when viewed in terms of Fourth Amendment values; and is, in any event, not supported by this Court's decisions. *See, e.g., Griffin v. Wisconsin*, 107 S. Ct. 3164 (1987) ("The search of Griffin's residence was 'reasonable' within the meaning of the Fourth Amendment because it was conducted pursuant to a valid regulation governing probationers," even though the search was based on facts establishing only the "likelihood" that the suspected inculpatory items would be found); *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (requiring either an "appropriate factual basis for suspicion directed at a particular automobile [or] some other substantial and objective standard or rule to govern the exercise of discretion"); *United States v. Mendenhall*, 446 U.S. 544 (1980) (Powell, J. concurring) (drug courier profile, applied by experienced officer, was a "well-planned, and effective Federal law enforcement program" satisfying

[22] Note, for example, that the FRA expressly exempted from the testing provisions employees involved in rail/highway grade crossing collisions, 49 C.F.R. § 219.201(b), observing that in most cases, such collisions are not caused by errors on the part of railroad personnel. *See* 50 Fed. Reg. at 31,543.

"reasonable and articulable suspicion of criminal activity" standard). The FRA's regulations satisfy the Fourth Amendment's test of reasonableness.

II. NO FOURTH AMENDMENT INTERESTS ARE IMPLICATED HERE BECAUSE THE FRA'S REGULATIONS DO NOT INVOLVE A "SEARCH OR SEIZURE."

Relying on *Schmerber v. California*, 384 U.S. 757 (1966), the Court of Appeals concluded that tests conducted pursuant to the FRA regulations effect a "search and seizure." In so holding, the court ignored a crucial distinction between this case and *Schmerber*. *Schmerber* involved administration of a blood test by force or threat of force; the FRA regulations, in contrast, expressly *prohibit* forced administration of tests.

Indeed, the only consequence of a refusal to undergo testing is an alteration of employment status.[23] The regulations require that an employee refusing to undergo Part C testing be disqualified for nine months from operating trains. Implicitly, the regulations also permit the employing railroad to make whatever other adjustments to employment status that the railroad may deem necessary and not inconsistent with legal obligations. The latter

[23] As noted *supra*, p. 11, the tests mandated here reveal drug or alcohol use—information devoid of constitutional protection. Respondents' claim that a search and seizure is involved therefore must rest on the administration of the tests, rather than on the information the tests yield. *Cf.* Comment, *"Drug Testing of Government Employees Should Not Be a Matter of Fourth Amendment Concern" Cries a Lone Voice in a Wilderness of Opposition*, 1987 B.Y.U. L. Rev. 1239, 1245-8 (noting that the Fourth Amendment analysis in *Schmerber* did not rest upon the physiological secrets which a blood test theoretically might reveal, and contending that the Bank Secrecy Act of 1970, held in *California Bankers Association v. Schultz*, 410 U.S. 19 (1973), not to implicate the Fourth Amendment, "certainly has the potential for revealing significantly more about an individual's private life than urine testing").

decisions will be made in the context of the procedures and requirements which Congress and the courts have deemed appropriate to protect the employment interests of railroad labor. While uncomfortable to the employee, these consequences in no way impinge upon his physical liberty.

This Court rightly refuses to engage in hypertechnical constructions of the words "search and seizure." *Terry v. Ohio*, 392 U.S. 1, 17-8 n.15 (1968). This does not mean, however, that those terms are devoid of content. The Court construes the terms according to their ordinary meaning, which contains, at a minimum, a requirement of physical compulsion. *See, e.g., Terry v. Ohio*, 392 U.S. at 19 n. 16 ("Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred"). *Accord, Michigan v. Chesternut*, 108 S.Ct. 1975 (1988); *INS v. Delgado*, 466 U.S. 210 (1984); *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). *See also United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976) ("neither the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search"); *United States v. Villamonte-Marquez*, 462 U.S. 579, 592 (1983) (brief encounter involving boarding of a vessel, visiting of public areas of the vessel and inspection of documents is not a search of the vessel or of its occupants). Here, where both force and the threat (objective *or* subjective) of force are lacking, no Fourth Amendment search or seizure occurs. *Compare Wyman v. James*, 400 U.S. 309, 317 (1971) (where visitation by social worker "in itself is not forced or compelled, [and] the beneficiary's denial of permission is not a criminal act," the visit is not a Fourth Amendment search, even though it may have "both rehabilitative and investigative" purposes, and even though benefits cease if the visit is refused).

CONCLUSION

For the reasons set forth above and for the additional reasons advanced in Petitioner's brief, the FRA's regulations should be held to be fully consistent with the Fourth Amendment, and the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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July, 1988